STATE OF MICHIGAN
IN THE
SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
White, P.J. and Wilder and Zahra, J.J.

People of the State of Michigan — Supreme Court No. 120205

Plaintiff-Appellant,

-vs-

$1,923,235.62 et al.,

Defendant-Appellee,

and

MEGABOWL, INC., PAM ENTERPRISES, INC., BETTY PUERTAS, JOSEPH B. PUERTAS, CHRISTOPHER PUERTAS, STEVEN PUERTAS, B.J. VENDING, INC., JOSEPH B. PUERTAS, INC., AREA CODE 313, INC., STIX A BILLIARD ROOM, INC., and MICHAEL MAZZA,

Claimants-Appellee.
_____/

Court of Appeals No. 218153
Oakland County Circuit Court No. 97-002514-CF
_____/

CLAIMANTS-APPELLEE'S BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT OF OPINION APPEALED FROM AND RELIEF SOUGHT

Claimants-Appellee do not dispute the statement of Plaintiff-Appellant as to the Opinion appealed from and the relief sought by them, except insofar as Plaintiff-Appellant asserts at page 2 of its Brief that the Court of Appeals "remanded the case back to the trial court . . . to award to the Claimants reasonable attorney fees as to the legal work done concerning the forfeiture action brought pursuant to the Criminal Enterprise Act." (Emphasis added by Claimants-Appellee.) The Criminal Enterprise Act (MCL 750.159f *et seq.*, hereinafter, CEA), provides that:

> (6) Reasonable attorney fees for representation in an action under this chapter are not subject to civil in rem forfeiture under this chapter. MCL 750.159m(6)

"This chapter" (Chapter XXVA, Criminal Enterprises) includes both the civil and criminal forfeiture provisions (MCL 750.159j and 750.159m) and the underlying felony charges (MCL 750.159i) upon which a conviction must be obtained in order to invoke either the criminal or civil forfeiture proceedings.

The Court of Appeals clearly stated at page 4 of its opinion (Plaintiff-Appellant's Appendix, p. 84a) that,

> . . . claimants are entitled to the reasonable attorney fees that were incurred as a result of representation in the action under the Criminal Enterprises Act. Upon remand, the trial court shall determine the amount of reasonable attorney fees that claimants incurred only as a result of representation in the Criminal Enterprises Act action, and award claimants that amount.

The Court of Appeals ruling thus, correctly, applies to all fees reasonably expended to defend both the civil forfeiture and the underlying criminal prosecution.

COUNTER STATEMENT OF QUESTIONS PRESENTED

I. Whether the attorneys' fees required to defend against a forfeiture under the Criminal Enterprise Act can be paid out of seized funds, even though the case involves a separate claim for forfeiture under the Controlled Substances Act.

The trial court answered, "no."
The Court of Appeals answered "yes."
Plaintiff-Appellant answers, "no."
Claimants-Appellee answer, "yes."

II. Whether MCL 750.159m(6) requires a court, prior to the final forfeiture determination, to grant a motion to return seized property to pay reasonable attorney fees.

The trial court answered, "no."
The Court of Appeals answered "yes."
Plaintiff-Appellant answers, "no."
Claimants-Appellee answer, "yes."

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

The general summary of the facts and proceedings set forth by the Plaintiff-Appellant is straightforward and correct. However, the remainder of the facts involved in the case, as they relate to the companion criminal case against third parties, Joseph E. Puertas and James Talley are both incorrect and largely irrelevant.

First, as already noted, none of the Claimants in this appeal have or will be charged in any criminal proceeding. Consequently, the facts of the allegations and criminal trial involving Joseph E. Puertas and James Talley are simply not relevant.

Second, the People disingenuously rely on the transcript of the preliminary examination in People v. Puertas and Talley. The facts adduced at the examination have been eroded, undermined, contradicted and otherwise disproved by the subsequent criminal proceedings and the discovery in the instant case, particularly as it relates to the control, surveillance, and observation of the confidential informant and the manner in which the transactions are alleged to have taken place. The criminal preliminary examination testimony has been shown to be false, fabricated, misrepresented or embellished in the various transactions. Certain officers alleged to have been on the scene as a part of the surveillance team have since sworn that they were not there and/or that they did not see what was attributed to them in the application for search warrant. As this Court knows, the criminal trial was followed by post-trial proceedings in which it was determined that the prosecution had failed to turn over an independent Michigan State Police investigation containing exculpatory information to the Defendants and a new trial was therefore granted.

The most significant fact about the third party criminal proceedings is that the so-called criminal enterprise was restricted to the six (6) alleged transactions which allegedly

occurred from August through November of 1997 between Joseph E. Puertas, James Talley, and the confidential informant (by order of the Court of Appeals in People v. Puertas, et al., CoA No. 211626, dated July 24, 1998. attached as Exhibit 1). Consequently, the idea that there is some basis on which to expand the so-called criminal enterprise to encompass other individuals, sites, locations or assets is unsupported and contrary to the law of the case. Significantly, the admitted evidence indicates that these transactions involved a monetary value of $2,300.00. It is from that tiny foundational base involving third parties that this entire $5.4 million dollar attempted forfeiture was undertaken.

Further, in the fall of 1999, the prosecutor, for unexplained reasons, negotiated a settlement agreement with one-half of the owners of PAM/Megabowl (generally known as the Anselmi branch of the family) returning approximately $1.5 million dollars from the proceeds of the sale of the land and business to them in exchange for $100,000.00 and a covenant not to sue. The apparent sole basis of the prosecutor's willingness to undertake that partial settlement was the fact that the "Anselmi's" were only cousins and nephews of criminal defendant Joseph E. Puertas, as opposed to remaining shareholders, his wife, son and a nephew in business with one of his sons. Betty Puertas, Joseph B. Puertas and Michael Mazza, the other fifty (50%) percent owners of PAM and Megabowl objected to this arbitrary partial settlement and distribution of the corporation's assets to some of the shareholders. They offered to settle their interests (1/6 each) under the same terms and conditions. The prosecutor, without reason, refused. The circuit court approved the settlement.

Consequently, the amount in controversy is closer to $4 million rather than the $5.4 million held at the time that this interlocutory appeal was originally filed in the spring of

1999. Further, ipso facto, if half of the monetary proceeds from the sale of land belonging to those 50% shareholders was not forfeitable as proceeds from any drug activity or criminal enterprise, neither can the other half of those same funds be tainted. The prosecutor's transparent purpose in withholding the money from criminal defendant Joseph E. Puertas' son, wife and nephew is to extort some sort of plea agreement or other concession from Joseph E. Puertas.

This expansive civil in rem forfeiture proceeding involves various groups of Claimant-Appellants with diverse ownership interests at stake in the various items of properly seized. Plaintiff-Appellee consistently glosses over these significant divisions, and inaccurately portrays the Claimants-Appellee and the seized assets as amorphous and fungible.

I The Consolidated Forfeiture Proceedings

The consolidated civil in rem forfeiture proceedings comprise two civil actions: Case No. 97-002514-CF, a drug and gambling forfeiture action brought pursuant to MCL 333.7521 et. seq. and MCL 750.308a ("the drug forfeiture") and Case No. 98-003343-CF, a criminal enterprise forfeiture action brought pursuant to MCL 750.159m ("the CEA forfeiture"), alleging the same facts, circumstances and predicate acts set forth in the drug forfeiture action. The trial court consolidated the two forfeiture actions for discovery and trial because the two actions involve substantially the same questions of fact.

These forfeiture proceedings arise from six alleged drug transactions over a four month period totaling less than $2,500 and the operation of a video poker machine at a bowling alley, bar and restaurant known as the Megabowl, located at 4880 Baldwin Road, Orion Township, Michigan. The bowling/bar/restaurant business was owned by Megabowl, Inc. ("Megabowl") and the real property and commercial building upon which the business

was located was owned by PAM Enterprises, Inc. ("PAM"). The drug transactions allegedly involved Megabowl employee, James Michael Talley, and a business supervisor at the Megabowl, Joseph E. Puertas.

II The Claimant-Appellants And The Assets Seized

The CEA forfeiture case involves distinct groups of claimants and property. On December 16 and 17, 1997, Plaintiff-Appellee executed no less than sixteen search warrants upon various geographic locations and on individual and corporate bank accounts, including the homes and businesses of all of the children and even some of the cousins of the criminal defendant, Joseph E. Puertas. Not one speck of any controlled substance was found at any of the sixteen locations searched. Nevertheless, based on the alleged six petty drug transactions involving less than 50 grams of cocaine, an unprecedented amount of personal and commercial property was seized. Plaintiff-Appellee seized the sum total of approximately $1,923,235.62 in U.S. currency. The cash seized was almost entirely from locales, individuals and entities separate and distinct from the PAM/Megabowl bowling alley property.

Indeed, Megabowl claims an ownership interest in only .3% of the currency seized, as follows:

A. Megabowl's First of America deposit bag containing $1,248.15 in cash, coin and checks; and

B. $4,876 seized from a safe located at the Megabowl.

Apart from the currency seized, Plaintiff-Appellee seized additional funds from numerous individual and corporate bank accounts which have been placed in interest bearing accounts subsequent to seizure. PAM and its shareholders claim an ownership interest in approximately $15,833.67, plus interest, seized from its First of America ("FOA")

bank account, No. 81-30157186. Megabowl and its shareholders claim an ownership interest in approximately $57,615.10, plus interest, seized from three of its FOA bank accounts. On or about the date of seizure, the funds in the Megabowl accounts were as follows: 1) approximately $12,479.71 from Megabowl's credit card depository account (used solely as a depository account for credit card transactions), FOA Account No. 81-30163911; 2) approximately $4,489.87 from Megabowl's cash investment account, FOA Account No. 81-30271102; and 3) approximately $40,000 from Megabowl's operating/checking account, FOA Account No. 81-35401522. Megabowl also claims an interest in $4,876 in U.S. currency seized from its safe and $1,248.15 in cash, coin and checks seized from its FOA deposit bag.

Plaintiff-Appellee also seized the parcel of real property and commercial building located at 4880 Baldwin Road, Orion Township, Michigan, which was owned by PAM, and which was the subject of a long-standing purchase agreement at the time of seizure. The purchase ultimately closed in escrow approximately three weeks after the seizure (January 5, 1998) and resulted in net sale proceeds of approximately $3.2 million, which were likewise placed in an interest bearing escrow account. PAM and its shareholders claim an ownership interest in the net real estate sale proceeds, plus interest earned from the date of seizure.

A. Property Seized From the Wife and Children of Joseph E. Puertas and From their Businesses.

The Game Room Arcade, 4445 Dixie Highway, Waterford Township, is owned by Christopher Puertas, the son of Defendant Joseph E. Puertas, where a safe contained $177,000.00 from the operation of the arcade business, the sole property of Christopher Puertas. (Dep. of Christopher Puertas 6/2/98, p. 85 and Affidavit of 7/29/98). This old safe

had been in the family for 25-30 years. Many in the family knew the combination to the safe, although it was only used by Christopher Puertas. No documentary evidence connects that safe or the money found within to indicate any relationship to Joseph E. Puertas, any use of the safe by Joseph E. Puertas, or any deposit or commingling of money from the alleged six drug transactions at the Megabowl.

A second safe at the Game Room Arcade contained tokens and other miscellaneous paper and cash related to the operation of the business. This was one of several "First of America" (FOA) safes which had been given to Joseph E. Puertas when the bank switched over some of its branches to ATM machines. Joseph E. Puertas gave these safes to various members of his family (all of whom are engaged in cash businesses). Similar safes were found in other locations.

Steven Puertas, a son of Joseph E. Puertas, owns a billiard room (Stix) at the same location as the Game Room Arcade in Waterford, located in a blocked off portion of the building. The building was also searched on December 16, 1997 and another FOA safe was found at the location. The safe contained approximately $44,000.00, the proceeds of the operation of a legitimate business (billiard parlor) and wedding gifts. (Steven Puertas Affidavit of July 29, 1998). Joseph E. Puertas did not use, have access to or have the combination of the Stix business safe. There is no indication that any of the monies generated by the alleged drug transactions engaged in by Joseph E. Puertas were contained in that safe on December 16, 1997.

Joseph B. Puertas (Transcript of Dep. May 22, 1998, pp. 113-119, separate record), owned and possessed a safe in a storage facility which was owned by his mother at 4479 Dixie Highway, Waterford Township. No other person knew or had the combination. This safe, which was the only safe which had to be forcibly opened by the police, contained the

proceeds of his business (primarily, the Shark Club in Waterford). There were no documents or papers relating to any other persons or businesses in the safe. There were no documents, papers or handwritings by any person other than Joseph B. Puertas in the safe. The safe contained approximately $1.59 million in U.S. currency, wrapped, counted and marked by him alone. None of the combination numbers found on Joseph E. Puertas at the time of his arrest would allow entry into this safe. There was/is no connection or commingling of funds found in Joseph B. Puertas' safe with the estimated $2,500 allegedly obtained by Joseph E. Puertas and Michael Talley between August and November 1997 as a result of the six alleged controlled substance transactions.

Betty J. Puertas, owner of B.J. Vending, owned the storage space at 4479 Dixie Highway, Waterford Township, where Joseph B. Puertas kept his safe. She also had a safe, one of the FOA devices, which was given to her by her husband. It contained approximately $100,000, the remains of a jewelry business inventory which she had owned in the 1980's, and her personal jewelry, some of which was inherited. Although all of the money and jewelry contained in the safe was hers and not that of Joseph E. Puertas, her husband admittedly had access to the storage shed and the combination to that safe. (Betty J. Puertas Affidavit of July 29, 1998).

A number of personal bank accounts belonging to the Puertas family members were also seized:

a.	Betty J. Puertas, FOA No. 01-5470527-1	$10,407.55
b.	The Betty J. Puertas Trust, NBD No. 1277863-07	$219,170.49
c.	BJ Vending, Inc., approximately	$20,000.00
d.	Christopher Puertas, FOA No. 01-5470529-7	$96,445.92
	Christopher Puertas, Personal Account. Returned.	$6,125.06

e.	Joseph B. Puertas, Shark Club (Waterford) Shark Club (Canton)	$300,000.00 $150,000.00
f.	Steven Puertas, FOA No. 813540086, approximately	$16,000.00

The People ultimately returned the sons' personal and business accounts, but retained all of the cash, the bank accounts of Betty J. Puertas and B.J. Vending and Betty J. Puertas' personal property and jewelry.

B. The Megabowl.

The purported drug and gambling activity is alleged to have taken place at "The Megabowl", a bowling alley, bar and restaurant located on the northeast quadrant of I-75 and Baldwin Road, in Orion Township, Michigan. The long anticipated Great Lakes Crossing Regional Shopping Center occupies the adjacent tract of land located on the southwest quadrant of I-75 and Baldwin Road.

In the summer of 1993, a group of investors (individual Claimants-Appellee shareholders in Megabowl and PAM, Kurt Anselmi, Albert Anselmi, Rudy Mazza, Jeffrey Mazza, Michael Mazza, Betty J. Puertas and Joseph B. Puertas) purchased the tract of land and a "run down" bowling alley from the Chapter 7 Bankruptcy Trustee of Zims Enterprises, Inc. These investors formed two separate corporations, which they funded and maintained with proceeds from their other legitimate businesses, savings, real estate and personal investments. PAM, owned the real property and Megabowl, owned and operated the bowling alley, bar and restaurant business. In October 1993, PAM purchased the real property out of bankruptcy for approximately $1.3 million utilizing a $1.1 million mortgage loan from First of America. (PAM subsequently refinanced in April 1994, increasing its borrowings to $1.34 million). In October 1993, Megabowl purchased the

business enterprise, fixtures and equipment out of bankruptcy for approximately $105,000. Each individual shareholder personally guaranteed PAM's indebtedness to First of America Bank. Further, one of PAM's shareholders, Rudy Mazza, pledged an additional $50,000 of his own money in the form of a certificate of deposit as well as an additional $200,000 in the form of a certificate of deposit from his business, Mazza Auto Parts, Inc., as additional collateral to secure the financing, as required by FOA. PAM contemporaneously executed a triple net lease with Megabowl, whereby Megabowl leased the improved portion of the real property from PAM to conduct the bowling alley, bar and restaurant business.

The real property appreciated significantly as surrounding development proceeded. In April 1996, PAM executed a Purchase Sale Agreement for the real property with Kirco Acquisition Corporation ("Kirco"). This ultimately resulted in the sale of real property on January 5, 1998, for approximately $3.2 million. Fifty (50%) percent of the proceeds plus interest thereon is currently held in escrow and forms the largest portion of the res at issue.

Pursuant to the search warrants executed on December 16 and 17, 1997, Plaintiff-Appellee seized and retained almost 15,000 pages of documentation and returned other documentation without retaining copies. Megabowl's daily balance sheets, Megabowl's and PAM's bank statements, and the Affidavits of Megabowl employees Joie Stephens and Corrine Mazza submitted in support of PAM and Megabowl's Motion for Summary Disposition establish that Megabowl and PAM adhered to strict bookkeeping practices and derived their revenues from legitimate business operations.

All Megabowl receipts and revenues were recorded and broken down on Megabowl's daily balance sheets. Joie Stephens and Corrine Mazza were primarily responsible for the accounting and bookkeeping functions. Ms. Stephens also specifically

calculated and completed deposit slips for daily deposits into Megabowl's Operating Account. The $1,248.19 seized from the Megabowl deposit bag and now sought to be forfeited is entirely consistent with the amount of Megabowl's daily cash deposits during the months preceding the seizure and the months subsequent to the seizure.

Megabowl also maintained a credit card account which was used solely as a depository account for credit card transactions in which credit card receipts were deposited, accumulated and then periodically transferred into Megabowl's operating account. Plaintiff-Appellant has not alleged that any of the alleged controlled substances and/or gambling transactions were paid for by credit card, yet unbelievably Plaintiff-Appellant even seized and continues to attempt to forfeit approximately $13,000 from Megabowl's credit card account.[1]

PAM was merely the owner/lessor of the real property and therefore, PAM's Operating Account was used almost exclusively to receive monthly rental payments from

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[1]**Under the CEA, Plaintiff must prove all elements of its case by clear and convincing evidence. MCL 750.159m and MCL 750.159q(1). Under an "instrumentality" theory, Plaintiff must prove that each item of property, such as each bank account, contributed "directly and materially to the commission" of the alleged predicate offenses. MCL 750.159f(b); MCL 750.159m(1); and MCL 750.159q(1). Similarly, under a "proceeds" theory, Plaintiff must prove that each item of property was "obtained through the commission" of the alleged predicate offenses. MCL 750.159f(e). Moreover, Plaintiff must also prove by clear and convincing evidence that each person claiming an ownership interest in the property had "prior actual knowledge of the commission" of the alleged predicate offenses. MCL 750.159m(3) and MCL 750.159q(1). Subsequent to the close of discovery for the People, on or about March 29, 1998, the People submitted Answers to Specified Interrogatories, as ordered by the trial court. The People tendered the following response on the issue of prior actual knowledge: "by having a known, previously convicted narcotics trafficker operate the business, [claimant/shareholder], would have impliedly consented to the sale of narcotics at the Megabowl..." Now, almost five years after the initial seizure, the People still lack absolutely any basis in fact necessary to establish prior actual knowledge of the alleged predicate offenses, as required under the CEA.**

Megabowl pursuant to the lease between PAM and Megabowl and then to make PAM's monthly mortgage loan payments of $11,641.99 to First of America. PAM's Operating Account was also used to receive periodic non-refundable payments from Kirco under the Purchase Agreement between PAM and Kirco of approximately $5,000 per month during the later half of 1997. Plaintiff-Appellee also seized the approximately $15,833.67 in PAM's operating account.

C. The Cessation Of Corporate Activity And Need For Attorney Fees.

Both Megabowl and PAM have ceased operations as a result of the real property sale to Kirco (who subsequently demolished the building and built a shopping center), and, accordingly, are not able to generate any revenue from which to pay their attorneys for continued representation in these forfeiture proceedings. Further, Megabowl and PAM have exhausted all funds previously generated from operations subsequent to initiation of these proceedings and are without funds to pay for continued legal representation.

Complex issues of law and fact are involved in these proceedings, and substantial pretrial discovery has been conducted on behalf of the Claimants. Exhaustive pretrial motions have been submitted on behalf of Claimants. Substantial attorney fees are due and owing to various attorneys for this representation.

D. Ownership of Seized Property

Although the legality of the underlying seizure of the res from which Claimants seek disbursement of reasonable attorney fees is not before this Court, the scope of the original seizure is important. MCL 750.159m(1) provides that:

> (1) Except as otherwise provided in this section, all real, personal, or intangible property of a person convicted of a violation of section 159i that is the proceeds of racketeering, the substituted proceeds of racketeering, or an instrumentality of racketeering, is subject to civil in rem forfeiture . . .

Only Joseph E. Puertas has been charged under MCL 750.159i. The statute clearly provides that, if he is convicted, only his property is subject to forfeiture. However, all of the property sought to be forfeited under 159m(1) was titled to and/or entirely within the exclusive control or possession of third parties – the Claimants herein. Therefore, the exemptions for interests of spouses and children, innocent owners, innocent security interest holders and innocent land contract vendors, necessarily applies interests in property in which both the convicted person and the innocent claimants share interests. The wholly separate property of third parties is simply not subject to forfeiture. Proving that "the property is subject to forfeiture" is the prosecutor's burden. MCL 750.159q(1)(a). This necessarily includes proving that the property sought to be forfeited belongs to (or, arguably is derived from forfeitable property that once belonged to) the person convicted of violating the CEA. This makes the trial court's refusal to disburse non-forfeitable property belonging to these Claimants particularly egregious and raises significant due process concerns.

ARGUMENT

INTRODUCTION

The questions presented here are (1) whether the Court of Appeals erred in finding that MCL 750.159m(6) entitles Claimants-Appellee to the release of a portion of seized assets for payment of reasonable attorney fees for representation in the underlying CEA proceedings and (2), assuming the Court of Appeals is correct, must the trial court release said assets prior to a final determination on the merits of the CEA claims. The issue of forfeiture and the seizure of assets from innocent owners and investors is an issue of great concern in today's society. To find that Claimants-Appellee, who are not charged with any criminal wrongdoing, are at risk to lose their significant assets, violates principles of fair play, fundamental fairness, and due process. MCL 750.159m(6) squarely and unambiguously addresses these concerns, checks the potential abuse of prosecutorial power, and explicitly provides Claimants-Appellee financial wherewithal to defend their property interests.

I MCL 750.159m(6) Expressly And Unambiguously Excludes Reasonable Attorney Fees From Forfeiture.

A clear and unambiguous statute leaves no room for judicial construction or interpretation. Coleman v. Gurwin, 443 Mich. 59 (1993). If the language used in the statute is clear and unambiguous, the legislature must have intended the meaning it plainly expressed and the statute must be enforced as written. Nation v. W.D.E. Elec. Co., 454 Mich. 489 (1997); Sanders v. Delton Kellogg Schools, 453 Mich. 483 (1996). In such circumstances, the plain meaning of the statute itself reflects legislative intent and judicial construction is not permitted. Tryc v. Michigan Veterans' Facility, 451 Mich. 129 (1996). The Supreme Court in In Re Forfeiture Of $5,264.00, 432 Mich. 242 (1989), set forth the

statutory rule of construction if the language of a statute is ambiguous. If the language of a statute is unambiguous, however, the intent must be determined according to the plain language of the statute. Here, the statute is clear on its face. Reasonable attorney fees are not subject to civil in rem forfeiture.

The People simply ignore the cardinal tenet of statutory construction - the inquiry always begins with the text of the statute. Indeed, Plaintiff-Appellant fails to discuss how or why the statute is unclear or ambiguous and thus fails to demonstrate the requisite ambiguity necessary for any further statutory construction or interpretation. Rather, Plaintiff-Appellee simply does not like the statute and rushes headlong into strained policy arguments and distorted views of legislative history. In short, Plaintiff-Appellant asks this Court to disregard the plain language of MCL 750.159m(6), which the Court of Appeals refused to do.

MCL 750.159m(6), provides:

> Reasonable attorney fees for representation in an action under this chapter are not subject to civil in rem forfeiture under this chapter. (Emphasis added)

The controlling statutory language is plain and clear. It does not warrant contorted interpretations by the prosecutor, as the Court of Appeals thoughtfully found. The People press the convoluted theory that only funds already paid to an attorney prior to the commencement of a forfeiture action brought under the CEA may not be forfeited. The statutory language does not refer in any way to reasonable attorney fees in the possession of attorneys at the time of seizure. If the Michigan legislature wishes to now amend the statute and to change what it initially intended and said, it can do so.

The prosecutor apparently urges a new rule of statutory construction - that in order to determine the meaning of a statute, the court should consider the "practical legal

significance" of the statute in preventing lawyers from running up fees. In fact, the Michigan legislature clearly provided a reasonableness limitation to protect against such potential abuses. In essence, there are prices to pay for living in a civilized society. As a result of this CEA forfeiture proceeding, the 11 individual and corporate Claimant-Appellants, as innocent property owners, have been forced to incur hundreds of thousands of dollars over the past four years in legal fees in an attempt to regain their property. The Michigan legislature in enacting MCL 750.159m(6) struck a balance in this type of proceeding by exempting reasonable attorney fees from forfeiture, as determined by an impartial judiciary and as ordered by the Court of Appeals.

The People's argument that the controlled substance statute contains no similar exclusion of attorney fees is irrelevant to the meaning of the CEA. In this regard, they rely on MCL 750.159v, which provides:

> This chapter does not preclude a prosecuting agency from pursuing a forfeiture proceeding under any other law of this state. (Emphasis added).

The prosecutor initiated the CEA forfeiture proceedings, alleging predicate acts under the Controlled Substances and Gambling statutes, and in so doing chose to avail itself of the powers (and limitations) applicable under the CEA statute. As a result, Claimants-Appellee have been forced to defend this CEA action in Oakland County Circuit Court, to research CEA and forfeiture law, conduct discovery, hire experts, and to develop a strategy to defend against the CEA forfeiture. This is a new statute (1996) and almost all of the issues involved are of first impression, both in Oakland County and the appellate courts.

Plaintiff-Appellant's argument disregards other fundamental tenets of statutory construction, asking this Court to strike the reasonable attorney fees exemption from the CEA or otherwise construe it out of existence and thus render it nugatory.

If by any reasonable construction two statutes can be reconciled and purpose found to be served by each, both must stand. Valentine v. McDonald, 371 Mich. 138 (1963). Further, if two acts are in irreconcilable conflict, *the latter act will control.* People v. Flynn, 330 Mich. 130 (1951). Courts have a duty to read conflicting statutes together *to avoid rendering any provision meaningless.* Walen v. Department of Corrections, 443 Mich. 240 (1993). When two statutes conflict, *more recently enacted law has precedence, especially when the statute is both more specific and recent.* National Center for Mfg. Sciences, Inc. v. City of Ann Arbor, 221 Mich. App. 541 (1997). If two statutes lend themselves to construction that avoids conflict, that construction should control; that is, construction should give effect to each statute without repugnancy, absurdity or unreasonableness. McCready v. Hoffius, 222 Mich. App. 210 (1997). Finally, legislators are presumed to have knowledge of and take into account existing statutes. Attorney General v. Public Service Com'n., 183 Mich. App. 692 (1990). The Court of Appeals opinion correctly adheres to these rules of construction. The People ignore them.

"[O]ne of the basic rules of statutory construction [is that] none of the language of a statute should be treated as surplusage or rendered nugatory; rather, the statute should be read so that all provisions in the statute are given meaning." LaGuire v. Kain, 185 Mich. App. 239, 243 (1990) citing Niggeling v. Dept. of Transportation, 183 Mich App. 770 (1990). The "Court must give meaning to all the words in a statute because it will not be presumed that the Legislature intended to do a useless thing." People v. Weiss, 191 Mich. App. 553, 559 (1991) citing Girard v. Wagenmaker, 437 Mich 231, 244 (1991). This policy has long

been in existence. Michigan Baker v. General Motors Corp., 409 Mich 639 (1980); Stowers v. Wolodzko, 386 Mich. 119 (1978); People v. Morton, 384 Mich. 38 (1970).

Here, not only do alleged violations of the Controlled Substances Act serve as predicate offenses under the CEA civil forfeiture action, but the legislature enacted the highly specific "reasonable attorney fees exemption" found in MCL 750.159m(6) and in MCL 750.159j(6), subsequent to enactment of the Controlled Substances forfeiture provisions. The Michigan Legislature understood that predicate offenses may constitute a separate and independent basis for forfeiture proceedings under other Michigan statutes. The legislature, however, did not subrogate the reasonable attorney fee exemption to the outcome of such other proceedings. Given the structure and language of MCL 750.159m(6) and MCL 750.159v, there exists an affirmative and express attorney fee exemption.

Under MCL 750.159v, the legislature clearly contemplated that identical property may be subject to forfeiture proceedings under separate statutes, but in the same breath it exempted reasonable attorney fees from forfeiture where the People proceed under the CEA.[2] Nothing in the text of MCL 750.159m(6) nor the Court of Appeals interpretation of that subsection precludes a prosecuting agency from pursuing a forfeiture proceeding under any other law of this state. The mere existence of a controlled substance forfeiture proceeding cannot obviate the operation of MCL 750.159m(6). Such a provision in a subsequently enacted statute on the same subject matter must be given effect according to the most rudimentary rules of statutory construction. The statutes are not in conflict in this

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[2]Plaintiff-Appellee erroneously asserts that Claimant's interpretation of MCL 750.159m(6) "would render MCL 750.159v null and void."

regard and therefore can be reconciled. The People are not required to proceed with a CEA forfeiture action. But, if they do, they are subject to the reasonable attorney fees exemptions contained in MCL 750.159m(6) and MCL 750.159j(6).

The federal cases cited by Plaintiff-Appellee are inapposite because the statutes at issue in those cases contain no express exclusion of attorney fees. Moreover, the Michigan CEA statute was adopted and became effective after U.S. v. Monsanto, 491 U.S. 600 (1989) and Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989). If the Michigan legislature intended to codify the decisions in the cases cited by Plaintiff-Appellee, it could easily have done so. Instead, it adopted the explicit attorney fee exemption now contained in MCL 750.159m(6).

The statute imposes only a condition of "reasonableness". Indeed, Plaintiff-Appellants' argument fails to address the analogous language exempting reasonable attorney fees from criminal forfeiture under MCL 750.159j(6), which buttresses Claimants' argument regarding legislative intent.

II The Legislative History Offers No Basis To Disregard The Plain Language of MCL 750.159m(6) Which Excludes Reasonable Attorney Fees From Forfeiture.

Adopted well after enactment of the controlled substance forfeiture statute, the CEA statute affords substantial protections for claimants in civil in rem and criminal forfeiture proceedings. The reasonable attorney fee exclusion under MCL 750.159m constitutes just one element of the various protections afforded claimants seeking to defend and preserve their property rights. As to innocent owners (such as the instant passive investors in a business or real estate venture), in order to prevail in a CEA forfeiture action, MCL 750.159q(1) provides, in pertinent part:

> The prosecuting agency has the burden of proving both of the following by clear and convincing evidence:
>
> (a) The property is subject to civil in rem forfeiture under section 159m.
>
> (b) The person claiming an ownership interest had prior actual knowledge of the commission of an offense listed in the definition of racketeering activity. (Emphasis added).

The People must prove prior actual knowledge of the alleged illegal activities in order to divest innocent owners of their fundamental property rights.

Based upon a review of the legislative history of the CEA, the final legislation significantly restricted the Government's power to forfeit seized property. The original version of the CEA bill subjected property to civil in rem forfeiture regardless of whether the criminal defendant was found guilty or acquitted and contained no reasonable attorney fee exemptions under MCL 750.159j(6) or MCL 750.159m(6) whatsoever. The final version of the bill addressed the concerns of opponents to the bill by providing that only property of a person convicted of a criminal violation under the CEA may be subject to civil in rem forfeiture, [see MCL 750.159m(1)], and by providing that reasonable attorney fees for representation in an action under the CEA are not subject to criminal forfeiture, MCL 750.159j(6), or civil forfeiture, MCL 750.159m(6). Therefore, the Michigan Legislature was specifically and affirmatively determined to add the reasonable attorney fee exclusion into the two separate sections of the final version of the bill that became law.

Nothing about the interpretation advanced by the Claimants contradicts the important purposes of the act set forth in the House and Senate analyses of the purposes of the act cited by Plaintiff-Appellant. Releasing non-forfeitable assets for attorney fees will not interfere with Michigan's newly-gained freedom from reliance on federal prosecutorial priorities or requirements of sharing seized assets with federal agencies.

The People repeatedly state that Claimants' interpretation "will deprive the rightful owners of the seized assets, the People of the State of Michigan, of those assets." Claimants, and not the State of Michigan, are the rightful owners of the seized property unless and until proven otherwise. The CEA excludes reasonable attorneys fees from forfeiture in order to allow claimants to defend their property rights in CEA proceedings initiated by the government. The prosecutor thus demonstrates contempt for those people of the State of Michigan whose property it seeks to seize and forfeit by seeking to deny them the financial means to defend their property rights. The CEA affords specific protection against such governmental and prosecutorial excess and abuse.

By analogy, in the federal system, a person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court pursuant to F.R.Crim.P. 41(c) for the return of the property on the ground that such person is entitled to lawful possession of the property or on other equitable grounds. This is a specific equitable remedy which has no direct counterpart in Michigan. The underlying rationale for Rule 41(c) is that there are circumstances in which the citizen cannot await any potential legal remedy ,thus justifying a court's equitable jurisdiction. Floyd v. United States, 860 F.2d 999 (10th Cir. 1988). Irreparable harm might exist if the movant needs seized funds for defense costs. Mr. Lucky Messenger Service, Inc. v. United States, 587 F.2d 15 (8th Cir. 1978); United States v. Bluitt, 815 F.Supp. 1314 (N.D. Cal. 1992). Further, the fact that citizens might need to pay or satisfy tax liabilities might provide the equitable basis for an early determination in advance of full adjudication. Commissioner v. Shapero, 424 U.S. 614, 96 S.Ct. 1062 (1976).

Federal law recognizes that this equitable jurisdiction and an immediate appeal may be necessary in order to protect the due process property rights of an ongoing business.

United States v. All Assets of State Wide Auto Parts, Inc., 971 F.2d 896 (2nd Cir. 1992); and In Re Seizure of All Funds in Names Registry Pub, 887 F.Supp. 435 (E.D. N.Y. 1995) (the ex parte seizure of the corporate bank accounts had the practical effect of shutting down the business). Consequently, MCL 750.159m(6) provides an important statutory counter-weight to what would otherwise constitute a violation of the due process property guarantees of the Michigan Constitution, Art. 1, Sec. 17, which does not otherwise explicitly exist in the Michigan statutes. This is especially true, where PAM and Megabowl are no longer ongoing concerns and have no funds with which to protect their interests.

Finally, even assuming arguendo that the People's wildest assertions are eventually endorsed by the trial court, the protections of the Eighth Amendment Excessive Fines Clause or the analogous Michigan constitutional guarantee (Article 1, Section 16) comes into play. The forfeiture explosion of the last 25 years is unique in American history, having previously been largely restricted to maritime prizes and certain common law civil forfeitures. Indeed, common law criminal forfeitures as practiced in England were abolished by the first Congress, 1 Stat. 112, now 18 U.S.C. 3563, which provides "no conviction or judgment shall work corruption of blood or any forfeiture of estate."

In 1993, the United States Supreme Court definitively held that the Excessive Fines clause of the Eighth Amendment (Michigan Const. Art. I, Sec. 16) was applicable to civil forfeitures Austin v. United States, 509 U.S. 602, 113 S.Ct 2801 (1993). Having established the right, however, the Supreme Court in Austin did not definitively set out the test to be used. Consequently, for the next few years the lower federal courts struggled with how to appropriately determine whether or not a civil forfeiture was unconstitutional as an excessive fine. The Supreme Court resolved the issue in 1998 in United States v. Bajakajian, 524 U.S. 321, 118 S.Ct. 2028, 141 F.2d 314 (1998). Although Bajakajian was

a criminal case, the court made it clear that the same analysis applies to civil forfeitures which Austin found to be punitive and thus constitute "fines." The Bajakajian court held that the test for excessiveness involved solely a proportionality determination and that the trial courts and courts of appeal review the issue of proportionality (excessiveness) de novo. The Bajakajian court upheld the district court in ordering the forfeiture of only $15,000 after the defendant was arrested and convicted of carrying $357,144 on an international flight without declaring that he was leaving the country transporting more than $10,000 in currency, as required by the U.S. Customs statutes. Here, the People sought forfeiture of third parties' property in excess of $5.4 million (now approximately $4 million), based on a less than $2,500.00 enterprise.

Consequently, even if Joseph E. Puertas is convicted of drug trafficking and racketeering, if the People can trace the proceeds of that trafficking to some monies seized from one of the claimants, and if the claimants fail to establish their status as innocent owners,[3] the amount of money which could be forfeited is minuscule in comparison to the more than $4 million seized and retained by the People. The maximum fine under MCL 750.159j(1) is $100,000.00.

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[3]**Pursuant to federal case law cited in support of PAM and Megabowl's previously filed motion for summary disposition, the corporate Claimants-Appellee are entitled to a return of their property based upon their uncontroverted status as innocent owners. United States v. One Parcel of Land Located at 3726 Highway 45 North, 965 F.2d 311 (7th Cir. 1992); United States v. One Parcel of Real Estate Consisting of Approximately 4,346 Acres, 852 F.Supp. 1031 (S.D. Fla. 1994); United States v. 141st Street Corporation, 911 F.2d 870 (2nd Cir. 1990); United States v. Route 2, Box 472, 136 Acres More or Less, 60 F.3d 1523 (11th Cir. 1995); and United States v. One Parcel of Real Estate Consisting of Approximately 4,657 Acres, 730 F.Supp. 423 (S.D. Fla. 1989). Here, of course, as part of its case-in-chief, Plaintiff-Appellant bears the burden of proving prior actual knowledge of the alleged predicate offenses by clear and convincing evidence. The Prosecutor has failed to identify any factual basis in this regard.**

Although the legislative history may not explicitly address MCL 750.159m(6), it does address the exemption of reasonable attorney fees from criminal forfeiture ultimately enacted in MCL 750.159j(6). The Senate analysis, a portion of which was previously cited by Plaintiff-Appellant, provides, in pertinent part:

> Reasonable attorney fees for representation in an action under the bill would not be subject to criminal forfeiture.

SFA Bill Analysis of 6/1/95, p.1. The exemption of reasonable attorney fees from forfeiture under the CEA was clearly intended and was repeated to apply with equal force to both criminal and civil proceedings under the CEA. Thus, the legislative intent and the purpose of MCL 750.159m(6) is not only expressed in the plain language of the statute itself, but also in the history as well.

The legislative history cited by the People in their application regarding their view that the sole purpose of the CEA was to maximize asset forfeiture contains some interesting phrases. The purpose of the CEA is to obtain the "proceeds and results of organized, continued patterns of illegal activity, free the state from federal priorities and allow the "proceeds to stay with the state," and "dismantle organizations that might survive the conviction of a few members." (Emphasis added).

At this point, the Court might well ask how the above expressions of legislative intent squares with the so-called $2,300 "enterprise" involved in the instant case. In fact, the legislature rightly feared giving this awesome power to local prosecutors to turn six (6) petty drug sales by 2 individuals to a single informant over a four month period involving less than 50 grams into a "criminal enterprise" at all. Indeed, one of the most menacing aspects of the prosecutor's "policy" argument is the fact he claims that most forfeitures are of a minimal nature (all but a few being less than $50,000 and most less than $20,000). Ipso

facto, according to the prosecutor, paying reasonable attorney's fees out of the seized raised might deplete it in most instances.

Claimants' response is that, given the extraordinary and draconian sweep of the CEA statute, it should not be employed willy nilly by local prosecutors seeking to enhance their image, create publicity, promote their election or fill public coffers. This is demonstrated by the final provision of the CEA, MCL 750.159x:

> Before conducting an investigation of activities suspected constitute a violation of Section 159i, a prosecuting agency who is the prosecuting attorney of a county or his or her designee shall notify the Department of the Attorney General of the proposed investigation. (Emphasis added).

Consequently, the legislature did not intend that this law be used in a haphazard fashion, but that it be a careful, thoughtful and unusual proceeding. That did not occur in this case. There was no notification or consultation with the Attorney General before or after the initiation of the investigation or initiation of the case. Arguably, if there had been, the matter would have been handled differently. MCL 750.159x is an indication of the seriousness and size of the forfeitures which the legislature anticipated would be undertaken under the statute, not the small forfeitures apparently contemplated by the People in their brief.

Indeed, there are dozens, if not scores, of ordinary statutes which can result in forfeiture which are appropriate to ordinary situations. Please see the index to the Michigan Complied Laws and MCL 600.4701 et. seq., which one presumes the legislature intended to be used in ordinary circumstances. They do not contain the same elaborate protections as the CEA. The prosecutor is free to utilize them. The prosecution of forfeiture under the CEA should be the exception, not the rule. But when the prosecutor

elects to use the more comprehensive statue, then the reasonable attorney's fees exception must be honored.

Finally, regarding policy, the prosecutor implies that allowing the accused or the claimant in a CEA case to have access to reasonable attorneys fees somehow eviscerates the statutory purpose of making sure that "crime does not pay." Assuming that removing the assets, proceeds and profits represented by reasonable attorney's fees from the possession and control of the accused racketeer, the Claimants' interpretation does exactly that. The monies are not returned to the alleged wrongdoers. They do not become available to carry on the enterprise, even assuming that the People are successful in the prosecution or in the forfeiture.

While it is clear that one purpose underlying the CEA is to enable law enforcement agencies to seize the proceeds of criminal enterprise activities, the purposes and objectives of the CEA are not unitary and not all assets seized are actually forfeitable. MCL 750.159m(1) specifically defines what property is forfeitable, subject to the exceptions set forth in the remainder of that section. In other words, property may be non-forfeitable or otherwise exempt from forfeiture, such as property that the government fails to prove was substantially connected to the alleged illegal activities by way of a proceeds or instrumentality theory or is otherwise subject to innocent owner defenses under MCL 750.159m(1)-(5). MCL 750.159m(6) likewise exempts a portion of seized property from forfeiture for reasonable attorney fees, but does not condition such an exemption upon the outcome of the litigation, in contrast to the other subsections.

Significantly, the limiting word "reasonable" takes into account many different aspects of the litigation, including its complexity, the nature and value of the assets and the expertise of the attorneys seeking the attorney fees - just as in any award of attorney fees

in any civil litigation. The trial court is in the best position to make such a determination. Undoubtedly, that is why the legislature reserved that power to the judiciary.

The case of United States v. Unimex, Inc., 991 F.2d 546 (9th Cir. 1993), closely parallels the case at bar and supports the claimant's position. In Unimex, the court reversed the criminal conviction of a corporation that was compelled to proceed to trial without counsel after seizure of corporate assets, based upon Fifth and Sixth Amendment violations. Unimex Inc.'s ("Unimex") president, Raul Velasquez ("Velasquez"), was convicted of money laundering and other charges. Unlike the case at bar, however, the government alleged that Unimex was nothing but a front for laundering drug money. Nonetheless, the Ninth Circuit emphasized:

> *Unimex may have other shareholders who have put honest money into it, and other officers and employees who thought they were running it as an honest business, and the corporation and other people dependent on it may be innocent victims of Velasquez's crimes.* Because Unimex was denied the opportunity to defend itself, no participant in the trial had an unalloyed interest in showing that this was true, the practical effect of a combination of laws and rules was to prohibit Unimex from defending itself, so the proceeding was unfair, and the verdict unreliable, as to Unimex.

Id. at 547-48. (Emphasis added). Prior to trial, Unimex tried unsuccessfully to obtain an adjudication on the issue of whether a portion of untainted money had been seized, and submitted affidavits as to Unimex's legitimate business operations to obtain release of such funds for attorney fees. Id. at 550.

Here, Claimants have been deposed and have submitted multiple affidavits and other financial and banking documentation in conjunction with their motion for summary disposition demonstrating that they derived their revenues from legitimate business operations. Plaintiff-Appellee has not offered any proof to the contrary. The affidavits

submitted by the shareholders of Megabowl and PAM demonstrate that they lacked any knowledge of the alleged illegal activities at the bowling alley. Plaintiff-Appellee has offered no proof to the contrary.

The Ninth Circuit found in Unimex that the affidavits "tended to show that Unimex was an innocent victim of Velasquez's crimes, and that the $100,000 sought was not forfeitable." Id. at 551. The court concluded:

> The government prevented Unimex from hiring counsel by taking all its property, and there has been no showing at an adversary hearing at which Unimex could be heard that property belongs to the government.
>
> . . .
>
> Unimex's right to counsel under the Sixth Amendment and to Due Process under the Fifth Amendment were violated *by taking away all of its assets, denying it an opportunity to show cause prior to its criminal trial that an amount it could have used for attorneys' fees was nonforfeitable*, and then forcing it to trial without counsel. Its conviction is REVERSED.

Id. at 551. (Emphasis added).

Similarly, in United States v. Noriega, 746 F.Supp. 1541 (S.D.Fla. 1990), the court held that the government could not deprive the defendant of assets available for attorney fees absent showing that assets were substantially connected to the alleged illegal activity and further that defendant was entitled to a show cause hearing on that issue.

In Noriega, the defendant sought to pay his attorneys with nonforfeitable funds. The court noted that "[e]lementary concepts of fairness suggest that no one, government or otherwise, should take and hold another's property which it has no legal right to hold." Id. at 1544. Here, at minimum, the government has no legal right to hold the bank accounts of Megabowl or PAM which are comprised exclusively of proceeds from legitimate business operations, nor, to hold the proportionate share of such corporate bank accounts owned by

Claimant/shareholders Michael Mazza, Joseph B. Puertas and Betty J. Puertas. Neither does the government have the right to hold the assets of third party individuals and corporations. The court in Noriega emphasized that nonforfeitable assets may be used to secure counsel.

Relying in part upon the United States Supreme Court's decision in United States v. Monsanto, 491 U.S. 600, 109 S.Ct. 2657 (1989) that due process may require an adversary hearing before a defendant is deprived of assets, the Noriega court held:

> [W]here a criminal defendant's only asset available for payment of attorneys' fees have been placed out of reach by government action, *due process mandates that the government be required to demonstrate the likelihood that the restrained assets are connected to illegal activity. This finding must necessarily be established in the context of a limited adversarial hearing which affords the defendant adequate opportunity to test the government's case.*

Id. at 1545-46. (Emphasis added).

Indeed, the Noriega court ordered an evidentiary hearing in which:

> The government will be required to state *whether any efforts were made to differentiate between assets and properties allegedly tainted by illegal drug activities and those acquired by other means.*

Id. at 1546. (Emphasis added).

The bottom line is that nonforfeitable assets are simply not subject to forfeiture based upon the holdings in Unimex and Noriega. Independently, the express language of MCL 750.159m(6) excludes from forfeiture altogether reasonable attorney fees incurred for representation in proceedings under the CEA, whether or not the property is forfeitable or nonforfeitable.

III. Plaintiff-Appellant's Reliance on North Carolina Law is Inapposite and Undermines Their Contentions.

The People admit that "[no] other states have statutory language identical to subparagraph 6." Nevertheless, they cite an innocent owner provision in a North Carolina statute in support of its argument that MCL 750.159m(6) treats attorneys "as a claimant who need not show lack of knowledge."[4] Contrary to the prosecutor's suggestion, the North Carolina statute diverges radically from the structure of MCL 750.159f *et seq.* generally and, in subsection M(6), particularly. Not only does the North Carolina statute treat attorneys as claimants or owners, unlike the CEA, the pertinent language relied upon by Plaintiff-Appellant provides:

> An attorney who is paid a fee for representing any person subject to this act, shall be rebuttably presumed to be an innocent party as to that fee transaction.

N.C. Gen. Stat. 75D-S(I) (emphasis added). The North Carolina statute specifically imposes an innocent owner analysis upon fees paid to attorneys in that state. In North Carolina, an attorney's status as an innocent party is by no means absolute, rather it is only a presumption. That is, the prosecuting agency may rebut the presumption by presenting evidence that the attorney had actual or constructive knowledge of the illegal activities. Furthermore, the North Carolina statute also explicitly applies to fees paid to attorneys by persons subject to proceedings under that act. Unlike Michigan's CEA, the North Carolina statute does not purport to exempt reasonable attorney fees from forfeiture. In North

---

[4]**MCL 750.159m(6) does not contain any innocent owner requirement - the parties agree on that. However, as discussed above, MCL 750.159m(6) by no means treats the exemption of reasonable attorney fees as a claim of ownership. A careful analysis of MCL 750.159m(1)-(5) reveals the defects in Plaintiff's conclusions with respect to subsection (6).**

Carolina, the fees are subject to a forfeiture proceeding. In Michigan, they are not. Again, it is fees that are exempted, not attorneys.

The People further rely on North Carolina law in support of the argument that by virtue of MCL 750.159v, the attorney fee exemption under MCL 750.159m(6) should not be interpreted to permit the diminution of property otherwise subject to forfeiture under the Controlled Substances Act. Once again, the North Carolina diverges in material respects from MCL 750.159v and further undermines the prosecutor's contention in this regard.

MCL 750.159v merely "does not preclude a prosecuting agency from pursuing a forfeiture proceeding under any other law of this state." The express language of the North Carolina statute relied on by Plaintiff-Appellee specifically preserves any other remedy available under North Carolina law, that is, the forfeiture of all seized assets. Whereas MCL 750.159v merely permits other forfeiture proceedings, the North Carolina statutes expressly preserves all other possible forfeiture remedies should the prosecuting agency prevail, and thereby preserves the entire res for forfeiture. MCL 750.159v provides:

> This chapter does not preclude a prosecuting agency from pursuing a forfeiture proceeding under any other law of this state.

In contrast, the North Carolina statute relief upon by the prosecutor provides:

> The application of one civil remedy under this Chapter shall not preclude the application of any other remedy under this chapter or any other provision of law. Civil remedies under this Chapter are cumulative, supplemental and not exclusive, and are in addition to the fines, penalties and forfeitures set forth in a final judgment of conviction of a violation of the criminal laws of this state as punishment for violation of the penal laws. (Emphasis added).

N.C. Gen Stat. §75D-10 (1997). The two statutes are dissimilar in this critical respect of actually preserving the remedy as opposed to allowing the pursuit of other forfeiture

proceedings. The Michigan legislature could have preserved all remedies available under other forfeiture statutes in MCL 750.159v, but it did not. Rather MCL 750.159v merely allows prosecuting agencies to pursue other forfeiture proceedings. Nothing in the language of MCL 750.159v purports to preserve all seized assets for forfeiture under other statutes or otherwise purports to preserve all possible forfeiture remedies should the prosecuting agency prevail under other such statutes.

The People's analysis in this regard fails to address the language of MCL 750.159j(11), which is somewhat more analogous to the North Carolina statute, as both pertain to remedies. MCL 750.159j(11) provides:

> Criminal penalties under this section are not mutually exclusive and do not preclude the application of any other criminal or civil remedy under this section of any other provision of law. (Emphasis added).

MCL 750.159j(11), however, expressly mandates only that criminal penalties are not mutually exclusive with other criminal or civil remedies. The North Carolina statute relied upon by Plaintiff states, in part, that "[c]ivil remedies are...cumulative, supplemental and not exclusive..." There is no such expansive language in CEA with respect to civil remedies under other forfeiture statutes. The legislature could have incorporated such language in MCL 750.159v, but it did not.

IV. MCL 750.159m(6) Clearly Allows The Release Of Funds For Reasonable Attorney Fees At This Juncture In The Litigation.

Plaintiff-Appellant's proposed, but unsupported, argument that the statute should be interpreted to apply only to funds received by a law firm prior to seizure actually undermines their policy argument that "crime should not pay." Under the People's interpretation, actual criminals would have a strong incentive to structure their assets so as

to keep attorneys on hefty retainers to avoid summary seizure and thereby ensure the financial wherewithal to defend their property and themselves. Conversely, innocent law abiding citizens, corporations, or unwitting owners of corporate property and real estate would have no such reason to segregate or deposit such funds with their attorneys, since they would have no reason to anticipate summary and indefinite seizure of their property. Obviously, the statute does not draw such a distinction, nor could the Michigan legislature have intended the inequitable and unjust result of depriving innocent people the financial means through which to defend themselves, while encouraging wrongdoers to enrich their lawyers in advance. The People's proposition is an invitation to mischief. The plain language of the statute precludes forfeiture of reasonable attorney fees, regardless of whether they are in the custody and control of the attorney or the government.

However, as noted by this Court in its Order granting application for leave to appeal, the statute does not specify when the trial court should address the state's possession of non-forfeitable reasonable attorney fees. Here, the Court is required to divine the intent of the legislature in light of the varying purposes of the different sub-sections of the statute.

Plaintiff-Appellant submits that the best time to accurately determine what amount is a reasonable fee is at the end of the litigation. Although this has a certain simplistic appeal, it wholly undermines the purpose of declaring attorney fees non-forfeitable. Plaintiff-Appellant does not dispute that the purpose of any attorney fee exception is to allow the owner to defend himself and/or his property, without regard to the attorney's possible knowledge of criminal activity which would otherwise require forfeiture. Delaying the release of the non-forfeitable attorneys fees until the litigation is done defeats the purpose.

Plaintiffs-Appellants also argue that since the prosecutor is not required to pay the attorney fees of a claimant who successfully defends his property against CEA forfeiture under MCL 750.159q(4) until the conclusion of the litigation, the same principal must apply to release of reasonable attorney fees not subject to forfeiture under MCL 750.159m(6). However, the prosecutor incurs no duty to pay attorney fees until the trial court has made a final determination that the property is not subject to forfeiture.

Similarly, the innocent owner, interest-holder or land contract vendor, like the spouse or child claiming the wrong-doer's interest in their primary home is exempt from forfeiture, must await the final determination of the court as to either the guilt of the alleged wrong-doer(s) and/or the validity of the claim of innocence or exemption. There is no restriction on when the court can make an innocent owner determination.

However, the exclusion of reasonable attorney fees from forfeiture under MCL 750.159q(4) is not contingent on the outcome of the proceedings or in any manner whatsoever. Had it so desired, the legislature could easily have included such a requirement, just as it did under MCL 750.159q(4). As the Court of Appeals found, it did not.

There is not only no need for release of non-forfeitable reasonable attorney fees to await a final determination of all issues in the CEA prosecution and forfeiture, to do so would frustrate legislative intent insofar as its purpose is to allow property owners the means to defend against CEA prosecution and forfeiture. Holding the unforfeitable attorney fees until the end of the litigation deprives the claimant of the benefit of representation which this section was intended to protect, unless he has independent, un-seized assets to retain counsel.

Further, 750.159m(6) applies to reasonable attorney fees "for representation in any action under this chapter". This includes fees for defense of the criminal charges under 750.159i. Therefore, this would require that the criminal attorney undertake representation on a contingency basis in contravention of the Michigan Rules of Professional Conduct , MRPC 1.5 (d), unless the defendant had sufficient non-seized assets to retain his attorney.

However, MCL 750.159m(6) is unconditional. It plainly does not require any proof of financial inability or indigency in order to render reasonable attorney fees exempt from forfeiture. Again, if the legislature had so desired to include such a provision, it could have, but it did not.

Taken to its logical conclusion, The Plaintiff Appellant's interpretation would provide incentive to prosecutors and police to seize every asset owned by a claimant so they could hold such assets non-reachable for attorney fees until after the litigation was concluded, and the need for an attorney had passed.

The People's reliance on MCL 750.159r in support of its suggestion that the statute does not permit an immediate disbursement of funds is misplaced and without merit. MCL 750.159r pertains solely to property that has already been successfully forfeited under the CEA statute, after the prosecuting agency has met its burden of proof under MCL 750.159m and MCL 750.159q. Obviously, that is not the case here. Reasonable attorney fees never become part of property otherwise subject to the disposition provisions of MCL 750.159r because they are not subject to forfeiture in the first instance.

Indeed, the language and construction of MCL 750.159m(6) and MCL 750.159r severely undermine the People's suggestion that the CEA statute does not authorize payment of attorney fees prior to conclusion of the action. Nowhere does the CEA provide for the payment of attorney fees *from forfeited property*. Payment of funds for reasonable

attorney fees is not one of the enumerated disbursements of successfully forfeited property set forth under MCL 750.159r. Rather, reasonable attorney fees are excluded from forfeiture in the first instance, are thus non-forfeitable, and should be released forthwith under MCL 750.159m(6).

MCL 750.159m(6) does not treat attorney fees as property in which a person (a law firm or an attorney) claims an ownership interest. In contrast, the remaining subsections of MCL 750.159m pertain to claimants or persons claiming an ownership interest in seized property. The structure of MCL 750.159m(6) is different in kind. The CEA's exemption of reasonable attorney fees diverges radically from its treatment of the claims and defenses applicable to claims of ownership. MCL 750.159m(6) is unconditional. It does not impose a "bona fide transferee" or "innocent owner" requirement upon the exemption of reasonable attorney fees. The attorney fee exclusion is not a claim of ownership and those seeking the release of seized funds for payment of reasonable attorney fees are not treated as claimants under the statute.

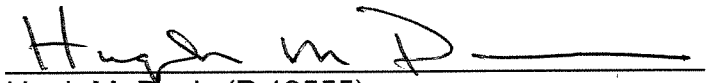
The best solution is for the court to require the state to release non-forfeitable attorney fees from the seized res as they are incurred and deemed reasonable by the trial court. Just as the trial court is charged with determining what fees are reasonable, it is well within the ordinary exercise of the trial court's discretion to establish a schedule for submission of applications for release of fees and determination as to their reasonableness.

CONCLUSION

For the reasons stated herein Claimants-Appellee, Megabowl, Inc., PAM Enterprises, Inc., Michael Mazza, Betty J. Puertas, Joseph B. Puertas, B.J. Vending, Inc., Joseph B. Puertas, Inc., Area Code 313, Inc., Stix, a Billiard Room, Christopher Puertas and Steven Puertas, respectfully request this Honorable Court affirm the decision of the Court of Appeals.

Respectfully submitted,

CONSTITUTIONAL LITIGATON ASSOC., P.C.

By: 

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CERTIFICATE OF SERVICE

Cynthia Heenan, states that on this 28th day of August, 2002, she served a copy of ***Claimants-Appellee's Brief*** and this *Certificate of Service* by First Class U.S. Mail upon:

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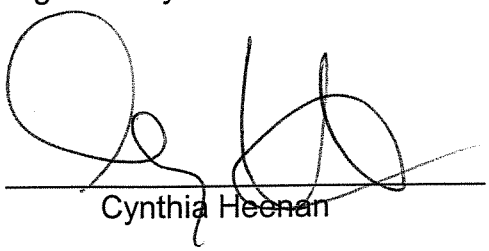

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